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IN THE

Supreme Court of the United States

No. 1038

MAY SPACH, Trustee,

Appellant,

versus

HERBERT M. FISHER, Bankrupt and
DRAKE OPERATING CO., INC.,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Act of Congress Relating to Bankruptcy:
- Section 24(c) 2
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Cases:
- Spach vs. Johnina, CCA, 5th Circ (1961) 291 F2d 619 ..... 7, 8

Texts:

Remington on Bankruptcy, Vol 5A:
- Sec. 2421 8
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I

This petition is filed on behalf of the Appellant, May Spach, Trustee for the above named Bankrupt, for a Writ of Certiorari of the cause styled above to review a judgment entered by the United States Court of Appeals, Fifth Circuit in these proceedings. The opinion accompanying said judgment was delivered on November 28, 1962, and is appended to this Petition for Writ of Certiorari.

II

The judgment rendered by the United States Court of Appeals, Fifth Circuit affirmed an Order of the United States District Court, Southern District of Florida, Miami Division, dated December 8, 1961, said Order determining that the Appellee, herein was entitled to a plenary suit, and reversing the ruling made by the Referee in Bankruptcy. Said judgment was entered **Nov. 28, 1962**, and is reported at F.2d .

Appellant petitioned the United States Court of Appeals, Fifth Circuit, for a rehearing of the above styled cause and on January 17, 1963 the Petition for Rehearing was denied.

This Petition for Writ of Certiorari is taken pursuant to Section 24(c) of the Act of Congress relating to Bankruptcy (11 U.S.C. Sec. 47) which vests the Supreme Court of the United States with jurisdiction to review judgments of the United States Court of Appeals in proceedings under the Bankruptcy Act.

III

THE QUESTION

"HAS A REFEREE PROPERLY EXERCISED SUMMARY JURISDICTION PURSUANT TO SECTIONS 23(a) and 2(a)(7) OF THE BANKRUPTCY ACT AFTER:

(1) THE APPELLEE'S MOTION TO SET ASIDE AN ORDER TO SHOW CAUSE AND TO DISMISS PETITION FOR TURNOVER FAILS TO SET FORTH SUFFICIENT FACTS TO ESTABLISH AN ADVERSE CLAIM,

(2) THE REFEREE THEN DEFERS RULING ON APPELLEE'S MOTION AND PROCEEDS TO A PRELIMINARY EXAMINATION AND EXTENDED HEARING TO DETERMINE WHETHER A SECURITY DEPOSIT, THE SUBJECT MATTER OF THE TURNOVER PROCEEDINGS, IS IN THE CUSTODY OR CONSTRUCTIVE POSSESSION OF THE BANKRUPTCY COURT,

(3) THE REFEREE MAKES FINDINGS OF FACT DETERMINING THE SECURITY DEPOSIT TO BE AN ASSET OF THE ESTATE AND ENTERS AN ORDER OF TURNOVER IN ACCORDANCE WITH SUCH FINDINGS,"

(4) THE FINDINGS OF FACT OF THE REFEREE ARE SUBSTANTIATED BY THE RECORD?"

IV

The federal law applicable to these proceedings is:

Section 23(a), Act of Congress Relating to Bankruptcy— Jurisdiction of United States and State Courts.

(11 U.S.C. Sec. 46). "The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same

extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

Section 2(a), Act of Congress Relating to Bankruptcy —Creation of Courts of Bankruptcy and Their Jurisdiction. (11 U.S.C. Sec. 11)." The courts of the United States . . . defined as courts of bankruptcy . . . are hereby invested . . . with such jurisdiction . . . to exercise original jurisdiction in proceedings under this Act, . . .

(7) . . . and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed . . . , he shall be deemed to have consented to such jurisdiction."

V

STATEMENT OF THE CASE

In this Petition the following symbol will be used:

"T" for Transcript which refers to the printed Transcript of Record.

May Spach, Appellant, the duly qualified and acting Trustee for the Bankrupt, Herbert M. Fisher, petitioned the Bankruptcy Court on November 19, 1959, for an order requiring the turnover of a security deposit of $133,000 under a lease agreement. (T-3) The Bankrupt was assignee of the original Lessee and the Appellee, Drake Operating Co., Inc. was assignee of the original Lessor.

Appellant on November 20, 1959 petitioned the Court for an Order to Show Cause, directed to Appellee Drake, to appear and show cause why the Petition for Turnover should not be entered. (T-6)

On November 27, 1959 Appellee filed its Motion to Set Aside Order to Show Cause and Dismiss Petition for Turnover. (T-1)

On November 30, 1959, the Referee deferred ruling on Appellee's Motion and conducted a hearing to ascertain whether Appellee's claim contesting the Referee's summary jurisdiction was more than colorable. (T-12-153)

On the date of the Hearing aforesaid, Appellee tendered an Answer to the Petition for Turnover, subject to the Referee's determination on the Motion to Dismiss. (T-7, 13)

On September 6, 1961, the Referee made his Findings of Fact and in accordance therewith entered an Order directing Appellee to turn over the security fund. (T-153)

Thereafter, on September 15, 1961, Appellee petitioned for a Review of the above Order, and on October 9, 1961, the Referee entered his Certificate of Review (T-157, 163) pursuant to Section 39(c) and 39(a)(8) of the Bankruptcy Act, providing the procedure for Review of Orders entered by the Referee.

On December 8, 1961, The Honorable Emett C. Choate, Judge of the United States District Court, Southern District of Florida, Miami Division, pursuant to the authority vested in him by the Bankruptcy Act, Sections

1(10) and 2(a)(15), entered his Order reversing and setting aside the Referee's Order dated September 6, 1961. (T-165)

Appellant then filed a Notice of Appeal pursuant to Section 24a of the Bankruptcy Act to the United States Court of Appeals, Fifth Circuit, to review the Order entered by the United States District Judge, and on November 28, 1962, the United States Court of Appeals rendered its Judgment affirming the District Court Order. (T-167) (Judgment and opinion appended)

Thereafter, Appellant petitioned for a Rehearing to the United States Court of Appeals, Fifth Circuit, and on January 17, 1963, said Petition was denied.

Appellant now files this Petition for Writ of Certiorari to this Honorable Court to review the proceedings below.

VI

ARGUMENT

(1) THE MOTION TO SET ASIDE ORDER TO SHOW CAUSE AND TO DISMISS PETITION FOR TURNOVER

The opinion delivered by the United States Court of Appeals, Fifth Circuit, affirming the Order of the United States District Court, makes no reference to the Motion to Set Aside Order to Show Cause and to Dismiss Petition for Turnover. To the contrary, the opinion recognizes that such a motion was filed by the Appellee, Drake

Operating Co., Inc., but bypasses an inquiry into the allegations set forth in the Motion, and proceeds to discuss Appellee's Answer which was directed to the merits of the controversy (page 2 of the Opinion). In point of fact, the Motion filed by Appellee which was relied upon to contest the use of summary jurisdiction by the Referee was defective in that sufficient substantive facts were absent precluding a jurisdictional attack. The Opinion cites the case of **Spach vs. Johnina**, decided June 21, 1961, by the U. S. Court of Appeals, 5th Circuit (rehearing denied on September 13, 1961 (certiorari denied by U. S. Supreme Court) and reported at 291 F.2d 619, which supplies the procedural requirements necessary to make a jurisdictional attack of the Referee's summary jurisdiction, to-wit: Substantial facts must be alleged in a Motion to Quash to show a substantial claim. (Page 7 of the Opinion in **Spach vs. Fisher**

The United States Court of Appeals, Fifth Circuit, stated in **Spach vs. Johnina** at page 5 of that Opinion (a copy of which is appended to this Petition):

> "It appears that the District Court, in entering its Order of reversal, assumed that the allegations contained in the answer of Johnina, Inc., were asserted in the motion to quash. If they had been so alleged we would agree with the trial court that the Referee did not have jurisdiction for summary order. However, this is not what is disclosed by the record before us, and we must, therefore, find that the trial court erred in reversing the order of the Referee retaining jurisdiction over the matter."

And at page 4 of the same Opinion, the Appellate Court stated:

> "Thus the burden was on the landlord to prove the amount of his actual damages, once it was clear that the Referee had acquired jurisdiction over the issue by failure of the appellee, in its motion to quash, to assert any factual basis for its claim."

It is noteworthy that the Motion to Set Aside Order and to Dismiss Petition filed by the Appellee herein, provides less of a factual basis, if any at all, in setting forth its adverse claim, than the factual framework presented in the Motion to Quash in the **Spach vs. Johnina** case, supra.

> "Where . . . possession is in the respondent and he wishes to retain it and rely on his right to plenary suit as an adverse claimant in possession, it is important . . . that he do not answer, or that he answer with care, in order to prevent waiver of such rights.
>
> "(The) effect of the Amendment (Sec. 2(a)(7) of the Bankruptcy Act) . . . as far as objecting to summary jurisdiction of the Bankruptcy Court . . . is concerned, the objection must come as by statute now prescribed; otherwise it is waived." (**Remington on Bankruptcy, Vol. 5 A, Sec. 2421**)
>
> "As to the manner of stating the objection, it should of course, be specific and informative. Where the basis of the objection is that re-

spondent is an adverse claimant of the property in question, was in possession thereof prior to Bankruptcy, and is entitled to retain it until or unless otherwise determined in a plenary suit, the facts should be set forth.

" . . . If a merely vague answer setting up status as an adverse claimant and asserting the right to plenary suit is interposed, the Trustee and the Referee may go into the basis of the claim; . . . ." (**Remington on Bankruptcy, Vol. 5A, Sec. 2422**)

(2) THE PRELIMINARY EXAMINATION TO DETERMINE IF THE SUBJECT MATTER OF THE TURNOVER PROCEEDING IS IN THE CUSTODY OR CONSTRUCTIVE POSSESSION OF THE BANKRUPTCY COURT

At the hearing on November 30, 1959, before the Referee to determine the Trustee's right to a turnover order, the Referee deferred ruling on Appellee's Motion to Set Aside Order and to Dismiss Petition for Turnover, with leave for Appellee to submit an Answer subsequent to the ruling on the Motion. (T-12, 13) The Referee then entered into preliminary examination to determine whether Appellee's claim to the security deposit was more than colorable.

The United States Court of Appeals' opinion in these proceedings recites cases emphasizing the well reasoned rule that when findings from preliminary inquiry show an adverse possession prior to Bankruptcy under a claim

of right or otherwise and not merely colorable, the proceedings for turnover should be dismissed and a plenary suit initiated by the trustee. This rule cannot be disputed, but the Court's citation of cases concerning the application of this proposition to the present proceedings presupposes that the Referee's findings of fact determined the claim of Appellee to be more than colorable and founded on some claim of right asserted in good faith by a timely motion to quash. Such a finding was not made by the Referee. The Court cannot take the position of a belated factfinder but must confine its duty to the task of determining whether the facts as found by the Referee, and not those facts merely alleged in Appellee's Motion and Answer, support the right of the Referee to entertain summary proceedings.

> "(I)f a right to retain possession is asserted by the Respondent, by virtue of an adverse claim to the property and possession running back to before the filing of the Bankruptcy petition, this raises a preliminary issue for determination by the Bankruptcy Court before proceeding further. There is no question but that the Court or Referee has power to pass upon such an objection, though it is equally well settled that the merits of the adverse claim cannot be gone into, but only whether it has some reasonable basis in law if established as Respondent credibly claims to be able to establish it." (**Remington on Bankruptcy, Vol. 5A, Sec. 2427**)

> "A necessary corrollary to these principles is that in all proceedings to recover summarily the possession of property from the hands of third

persons, there is preliminary jurisdiction to inquire into the nature of the defendant's possession and into any adverse claim so far as to see whether it is more than colorable. In other words it becomes necessary for the Court to determine as to the substantiality of the adverse claim, if any, prior to assuming summary possession of the property and for this reason the Court may make its inquiry into the basis of the claim. The mere assertion of an adverse claim is not enough to prevent the exercise of summary jurisdiction by the Bankruptcy Court." (Colliers, Vol. 2. Para 23.07, p. 521)

(3) THE FINDINGS OF FACT BY THE REFEREE AND HIS ENTRY OF TURNOVER

(4) THE FINDINGS ARE SUBSTANTIATED BY THE RECORD

On September 6, 1961, the Referee made his Findings of Fact and entered a Turnover Order requiring the Appellee to surrender the proceeds of the security deposit. (T-153)

Appellee contends that the Referee overstepped the limits of his jurisdiction by inquiring into the facts and circumstances surrounding the disposition of the security deposit. In order to determine whether Appellee's claim was adverse or colorable, preliminary hearing was undertaken, all parties appeared before the Referee and all issues were fully and fairly presented for his determination. Appellee had the opportunity to develop its contentions in protesting the exercise of summary jurisdiction

as set forth in its Motion. Findings were made as substantiated by the record (T-12-153), reflecting that Appellee's claim did not prove to be adverse, and supporting the Trustee's right to a turnover Order. (T-154-157)

> "The judge shall accept findings of fact made by the Referee unless they are clearly erroneous. Such findings should not be disturbed on appeal if supported by substantial evidence." (**Amer. Juris., Vol. 6, Rev'd Ed., Sec. 725; Bankruptcy Act, Gen. Order XLVII**)

CONCLUSION

It is submitted that this Honorable Court should grant Petitioner's request for Writ of Certiorari to eliminate the confusion and direct conflict existing by reason of the Opinions rendered by the United States Circuit Court of Appeals, Fifth Circuit, in the proceedings herein and in the case of **Spach vs. Johnina.**

FRANK & WESTON

By _____
Attorneys for Appellant

CERTIFICATE OF SERVICE

I do hereby certify that copies of the foregoing Petition were furnished to Jepeway & Gassen, 101 E. Flagler St., Miami, Fla., and Broad & Cassel, 420 Lincoln Rd., Miami Beach, Fla., attorneys for appellee.

FRANK & WESTON

By